In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 638

JAYS FOODS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, AND LOCAL UNION NO. 1, AMERICAN BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

On October 9, 1963, the National Labor Relations Board conducted an election to determine whether certain employees of the petitioner company desired to be represented by respondent Union. The Union lost the election, but filed timely objections alleging that the Company had engaged in conduct that affected the results of the election. After investigation, the Regional Director on December 13, 1963, ordered a hearing to resolve issues of credibility raised by the Union's objections. (Pet. 5a.)

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A hearing was held at which all parties participated, and, on February 11, 1964, the hearing officer recommended that the election be set aside and that a new election be conducted (Pet. 31a–33a). This report was adopted by the Regional Director, but, upon the Company's petition for review, the Board remanded the proceeding to the hearing officer for further findings and for a discussion of the credibility issues (Pet. 34a–36a). On May 11, 1964, the hearing officer, in a Supplemental Report on Objections (Pet. 10a–30a), found, *inter alia*, that the Company president had threatened to withdraw benefits and to commit other reprisals if the Union were selected, that this and other conduct affected the election results, and that the first election should be set aside and a new one held. The Company filed a petition for review with the Board, which, on August 11, 1964, adopted the examiner's decision (Pet. 5a–9a).

The Company then filed in the court of appeals a petition for review of the Board's order directing a second election. On the Board's motion the court dismissed the petition for want of jurisdiction (Pet. 1a–2a).[1]

The court of appeals' ruling was plainly correct, and there is no occasion for review by this Court. It is well settled that Board orders directing a representation election are not "final orders" subject to direct review by the courts of appeals under Section 10 of the Act (*American Federation of Labor* v. *National*

[1] However, the court, which had stayed the second election pending its decision, continued the stay until November 6, 1964 (Pet. 3a–4a).

Labor Relations Board, 308 U.S. 401; *National Labor Relations Board* v. *Electrical Workers*, 308 U.S. 413)[2] and this Court has "consistently refused to allow direct review of such orders in the Courts of Appeals * * *" (*Boire* v. *Greyhound Corp.*, 376 U.S. 473, 479). Under the statutory scheme, such orders may be reviewed only in connection with review of a Board order entered in an unfair labor practice proceeding growing out of a refusal to bargain with a union selected in the election. See Section 9(d) of the Act (Pet. 38a–39a). In other words, if the union in this case should win the second election, if the company should refuse to bargain with it, and if the Board ultimately should direct the company to do so, the company then could challenge the second election as an incident to judicial review of the order to bargain. It cannot, however, obtain direct review in the court of appeals of the order directing the election.

There is no basis for petitioner's contention (Pet. 20–21, 22, 30, 42) that the foregoing rule applies only to the first election that the Board directs but not to a subsequent election. Neither the language of the Act nor the decisions announcing the rule support or even suggest such a limitation, and the basic policy underlying the rule—avoidance of the delay that permitting direct review of Board election orders would

[2] Section 10(f) of the Act provides that any "person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order" in the court of appeals. In the cases cited *supra*, the Court held that the term "final order" refers to an order issued at the culmination of an unfair labor practice proceeding under Section 10 of the Act.

cause—is equally applicable in both situations. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 409–412; *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477–479.

Equally erroneous is petitioner's theory (Pet. 19, 30, 38–41, 43) that it could have secured immediate judicial review of the Board's election order if the Board, in a consolidated representation and unfair labor practice proceeding, had held that the conduct which was the basis for setting aside the first election also constituted unfair labor practices. For even in that case the company, although it could directly challenge the unfair labor practice finding, could not simultaneously obtain review of the order directing the election. For the latter order may be reviewed only when it forms the basis of—and not merely because it is entered in conjunction with—an order directed against unfair labor practices. *National Labor Relations Board* v. *Falk Corporation*, 308 U.S. 453. Accord: *National Labor Relations Board* v. *LaSalle Steel Co.*, 178 F. 2d 829, 832, n. 1 (C.A. 7), certiorari denied, 339 U.S. 963; *Hendrix Mfg. Co.* v. *National Labor Relations Board*, 321 F. 2d 100, 106 (C.A. 5); *Big Lake Oil Company* v. *National Labor Relations Board*, 146 F. 2d 967 (C.A. 5); *National Labor Relations Board* v. *Plaskolite, Inc.*, 309 F. 2d 788 (C.A. 6); *National Labor Relations Board* v. *Thompson Products*, 162 F. 2d 287, 294, 301 (C.A. 6); *National Labor Relations Board* v. *J. L. Brandeis & Sons*, 145 F. 2d 556 (C.A. 8); *DuPont & Co.* v. *National Labor Relations Board*, 116 F. 2d 388, 401 (C.A. 4), certiorari denied, 313 U.S. 571;

Bonwit Teller, Inc. v. *National Labor Relations Board,* 197 F. 2d 640 (C.A. 2), certiorari denied, 345 U.S. 905.

Finally, the Administrative Procedure Act (5 U.S.C. 1000, *et seq.*) does not empower the court of appeals to review a Board representation order, where the National Labor Relations Act, as construed by this Court, precludes such review. See *Timken-Detroit Axle Company* v. *National Labor Relations Board,* 197 F. 2d 512, 513 (C.A. 6); *Ohio Power Company* v. *National Labor Relations Board,* 164 F. 2d 275 (C.A. 6); *Cameron & Franks* v. *National Labor Relations Board,* 207 F. 2d 775 (C.A. 6); *Ove Gustavsson Contracting Co.* v. *Floete,* 278 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LAWRENCE M. JOSEPH,
Attorney,
National Labor Relations Board.

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